

## INTRODUCTION

Between April and August 1994, more than two million people fled from Rwanda in possibly the largest mass exodus in history. But the refugees found neither sanctuary nor security. The huge camps that were established in neighboring countries also became home to Rwanda's *génocidaires*, both the architects and the foot soldiers of the slaughter. Intent on prolonging the violence, the former Rwandan armed forces and militias—the *inter-ahamwe*—saw the resource-rich camps as staging areas and recruitment centers to fuel their war machine. As thousands of genuine refugees faced violence and intimidation, the *génocidaires* enjoyed total impunity.

The international community found itself utterly unprepared to deal with the catastrophic consequences of the genocide—either to deal with those who had committed serious crimes and provoked the flight of others from their countries, or to assist in providing security and protection in the countries where they sought refuge. The result was widespread violence in the camps, fear and instability in host countries and dangerous compromise of the humanitarian effort.

In 1995, the Lawyers Committee for Human Rights published *African Exodus*, the first comprehensive study of the state of refugee protection in Africa. *African Exodus* identified four urgent tasks facing those straining to deal with the refugee outflow from Rwanda:

- guarantee that those seeking protection were admitted across borders to safety
- swiftly identify the perpetrators of the genocide hiding amid the refugee population
- ensure the physical security of refugees and host communities—in particular, by separating out from the majority of the refugee population those who threatened to subvert the civilian (non-military) and humanitarian purposes of the refugee camps, and

- create appropriate linkages between refugee protection activities and the pursuit of justice, thus preventing further cycles of violence and impunity.

But the calls for such decisive action were not heeded. Amidst the chaos and carnage the efforts of non-governmental and State actors were undermined by poor definition of roles, lack of coordination and a confusion of responsibilities. There was uncertainty about the legal and policy frameworks that might be applied to respond to such an unprecedented emergency. Compounding the potential for disaster was a derogation of political will by those States who could have taken the lead in the international community. No one was prepared to take responsibility for ensuring the security of refugee camps and neutralizing the activities of the fighters and *génocidaires*.

In September 1997, the consequence of the international community's failure to act erupted in blood in the camps on the Rwanda-Zaire border. Thousands of refugees were slaughtered, the settlements destroyed and over half a million refugees driven further into the Zairean forests or back into Rwanda. The stage was set for the ignition of a wider conflict which still engulfs the entire Great Lakes region of Central Africa today.

*Refugees, Rebels and the Quest for Justice* is based on a study of the refugee crises precipitated both by the Rwandan emergency and the conflict in West Africa in the late 1990s. In examining the obstacles to protection faced by refugees in situations where human rights abusers, criminals and armed fighters are mixed in with the arriving refugee population, the report takes as its starting point the refugee law concept of exclusion as set out in the exclusion clauses of the two principle Refugee Conventions.<sup>1</sup> Through the exclusion clauses international law prohibits individuals who have committed serious crimes (including crimes against humanity and genocide) from being considered as refugees. Although such persons continue to be entitled to protection of their human rights, they are considered to be "undeserving" of the special status of refugee because of

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the egregious nature of their past actions. The report acknowledges, however, that applying the exclusion clauses successfully necessarily triggers a range of other activities which must be undertaken in a rights-respecting manner if the safety of refugees is to be ensured.

*Refugees, Rebels and the Quest for Justice*, goes on to identify the gaps which exist in law and practice currently preventing States and others from dealing in an integrated manner with three imperatives which are at the core of exclusion and the obligation to respond to refugee crises in times of war: protecting refugees, maintaining security and ensuring accountability for serious crime. It suggests the elements of the broader refugee, human rights and international law framework which might provide the basis for developing an improved set of tools to strengthen protection of refugee rights on the ground, including a more effective application of the exclusion clauses.

At the conclusion of the report, an *Agenda for Action* is addressed to the international community. The *Agenda* contains a set of recommendations for making refugee protection more effective in situations of conflict and mass exodus. Drawing on the analysis of the Rwandan and West African crises, the *Agenda* acknowledges that a wide range of actors, beyond those usually understood as having a refugee protection mandate, must work in concert if their obligations to protect civilians are to be fully met in such complex theatres. Now, more than ever, in a globalized and more volatile world, refugee rights and human rights are essential components of international and human security. As the UN Deputy High Commissioner for Human Rights, Dr. Bertrand Ramcharan, remarked in December 2001, “national and international security cannot be achieved without respect for individual security in the form of respect for human rights and fundamental freedoms.”<sup>2</sup>

The response to the events of September 11, 2001 in the United States has unfortunately threatened this developing understanding. There is a danger that the essential interdependence between the three tasks of protecting the rights of those

who flee persecution, ensuring that those who threaten the rights and security of others do not enjoy impunity, and building international peace and security, will be reconceived. There are those who contend that in the context of a “terrorist”<sup>3</sup> threat the rights of those who move across borders may be trumped absolutely by security concerns. The Lawyers Committee rejects this interpretation. The lessons of the Rwandan and West African experiences demonstrate clearly that achievement of all three vital objectives—respecting rights, combating impunity and ensuring security—is predicated on their pursuit, not as opposing goals, but as mutually, *and necessarily*, reinforcing projects.

**PART I: UNMASKING VIOLATORS, PROTECTING VICTIMS:  
THE DILEMMAS OF EXCLUSION**

The Rwanda emergency presents the most striking example in recent history of how the failure to both protect refugees and fight impunity can critically escalate a crisis. Chapter 1 sets out the background to the Rwanda exodus and describes the key obstacles to protection experienced by those who fled in terror from the genocide or who were forced ahead of the *interabamwe* to act as shields in their murderous retreat. Among the most urgent tasks facing those who came to the aid of the refugees as they crossed the borders was identifying the perpetrators of the genocide and others who might threaten the civilian and humanitarian character of the camps.

International refugee law contained a mechanism—exclusion—that, at least in theory, provided a foundation for effective action: individuals who have committed serious international crimes are not permitted to avail themselves of the protection of the refugee regime. In many ways exclusion can be viewed as a permanent valve which mediates between the obligation to protect those threatened with serious human rights violations (refugees) and the goal of combating the impunity of the authors of such violations. Serving as a reminder that criminals may not be unjustly sheltered, exclusion can play a role in triggering a

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State's obligation to search out those who have committed the most serious of crimes and ensure that they are held accountable for their actions under international law.<sup>4</sup>

In the chaotic context of Rwanda, however, translating legal provision for exclusion in refugee law into operational reality raised a variety of legal and practical questions which had never been fully considered. What benchmarks would guide decision makers in applying the exclusion clauses in order that the rights of genuine refugees were not jeopardized? Among the thousands fleeing, to whom should the exclusion clauses be applied? Before applying exclusion there must be serious reasons to consider that an individual has committed, or is guilty of, one of the crimes or acts stipulated in the clauses. What standard, and indeed burden, of proof applied in the extreme conditions of the Rwandan exodus? On a procedural level, what rules would govern the screening process—the process for identifying those who should be excluded? Where refugees had been recognized as such immediately upon arrival (“on a *prima facie* basis”<sup>5</sup>) what would be the legal status of any subsequent individualized screening process? Who would be responsible for carrying out the screening, especially in impoverished host States with feeble legal systems? And would those who were potentially excludable have access to legal advice or assistance? Finally, what should happen to someone after he or she had been excluded?

Political pressures eventually forced the authorities to attempt to screen for those who might be excludable (excluees). States and the United Nations High Commissioner for Refugees (UNHCR), the UN Agency with the primary mandate for protecting refugees, initiated screening procedures in a number of countries. These screening operations were the crucible in which the answers to the difficult legal and practical questions thrown up by the extreme character of the circumstances of the Rwandan exodus began to be forged.

Chapter 2 provides a detailed analysis of how the dilemmas of exclusion were handled in three selected screening exercises which were carried out in the Central African Republic, Kenya and Tanzania in 1997 and 1998. It quickly became apparent to all observers of the screening processes that more work needed to be done to develop clearer guidelines on the scope of the clauses and on the procedural standards which surrounded their application, particularly in the special situations of mass influx. The lessons drawn by the Lawyers Committee from these highly pragmatic accounts of the screening attempts provide the frame for the development of recommendations relating to procedural fairness set out in Chapter 5.

**PART II: PROTECTING RIGHTS, DEFENDING STATES:  
REFUGEE SECURITY IN A TIME OF WAR**

While the international community was still grappling with exclusion and attempting to provide security for refugees in the Great Lakes region, the conflict which had been raging in West Africa reached a new intensity. Chapter 3 outlines the movements of Sierra Leone refugees into Guinea and Liberia between 1996 and 2000 and examines the responses of States and the international community to the influx. In Guinea there was a fear that armed combatants were among the arriving population and might jeopardize State security. Nervous authorities implemented strict border controls. In some cases, this resulted in security forces ordering the immediate pushback of refugees to Sierra Leone, based on mere suspicion of combatant status—a kind of summary exclusion procedure without any assessment of the need for protection. In Liberia, there were fears among humanitarian workers that armed elements (whose presence was generally tolerated by State authorities for political reasons) might threaten the safety of the refugee camps. This spurred UNHCR and others to consider how certain groups, including armed elements, might be separated out from the majority of the refugee population (*separation*) for purposes of better ensuring the security of the refugees.

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The application of the exclusion clauses was also bound to underlie policy discussions in the light of the savage atrocities which were being carried out by the warring factions in Sierra Leone. But it was clear that confusion existed among governments and other actors about the respective uses and purposes of exclusion and separation. At times, in fact, although quite distinct in origin and purpose the terms *separation* and *exclusion* appeared to be invoked interchangeably during discussions on how to manage the influx.

Exclusion is a legal concept that helps to identify individuals who should not be treated as refugees under international law. Separation, on the other hand, is not a legal concept but a term given to a variety of actions and operational measures designed to remove selected individuals from the general refugee population. These individuals may be subject to separation for a variety of reasons—they may, for example, have a status incompatible with that of refugee, they may pose a security threat, or their identity may be in question.<sup>6</sup> They may even be separated as a preliminary measure prior to the conduct of an exclusion screening procedure. The rights enjoyed by those who are separated (freedom of movement, etc.) will depend on the purpose for which the separation operation is carried out and their legal status.

Unfortunately, separation activities are often conducted without reference to an identifiable legal framework. The result is that the rights of genuine refugees and others are violated. This occurs particularly when separation measures are implemented as a substitute for correctly applying the exclusion clauses, and minus all the legal safeguards that such a process provides. Even where separation *is* legally permissible, it may not always be in the best interests of the security and integrity of the refugee settlement in the long term—separation can run the risk of unfairly stigmatizing those who are separated, lead to prolonged and illegal detention, complicate future repatriation efforts, divide families and reinforce military structures of command and control. The decision to impose a separation measure requires a careful examination of a range of legal, political and social ramifications.

The relationship between applying exclusion and applying the law of armed conflict and exclusion can also be subject to misunderstanding in complex emergencies. Combatants and others who engage in unlawful activities in a refugee camp are not necessarily excludable. Neither are former combatants—although the nature of the conflict in which they have participated may suggest that they should undergo screening for exclusion. The correct response to *active* combatants is to separate or intern them in line with the laws of armed conflict and humanitarian law. At a minimum their military status will be incompatible with refugee status. There may also be confusion between applying exclusion and responding to criminal acts which are carried out in the host country by refugees and others. Criminal behavior should be prosecuted as required under domestic law—exclusion relates to a consideration of activities carried out before the refugee arrived. At the same time, however, those who conduct criminal or military activities in refugee settlements may, of course, also be excludable.

Ultimately in West Africa, large-scale refugee separation operations were not conducted and the horrific violence witnessed in the Rwandan camps was not replicated on the same scale. But the Liberian and Guinean experiences reinforced one of the key conclusions of the assessment of the response to the Rwanda emergency: there was a dearth of appropriate legal and policy guidelines to deal with the protection and security of fleeing populations in complex conflicts. A comprehensive legal framework which would guide how refugee rights and the rights of others caught up in refugee movements might be best protected remained unelucidated. It was clear that these matters needed to be approached from a broader standpoint than that simply of refugee law.

Chapter 4 thus takes a step back from the field realities of the camps of Zaire and Guinea to provide an overview of the key threats which face refugees and host populations where human rights abuse and conflict are the hallmarks of a crisis. The refugee may in fact be both victim *and* generator of insecurity

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depending on the particular circumstances of the outflow. There is certainly a complex relationship between refugee protection, exclusion, refugee security and State security. States, of course, have a legitimate interest in protecting security and public order within their boundaries—indeed they are obliged to do so. But this imperative is often activated in a way which conflicts with, and undermines, the obligation to protect the rights of refugees. It need not be so. This report suggests that a reconciliation of these apparently competing imperatives might be approached by using the human security model, a notion that complements the imperatives of national and territorial security which have traditionally shaped the conduct of governments. Human security, for example, measures values such as individual people's safety and wellbeing—their freedom from fear and from want—as components of security.

It is in the context of human security that elements of a human rights framework which might guide responses to the challenge of ensuring the safety and wellbeing of refugee and host populations are examined. The range of situations in which an individual refugee might be subject to the kind of separation measures contemplated in Liberia and described in Chapter 3 are, in particular, subject to scrutiny.

### **PART III: RIGHTS, SECURITY AND ACCOUNTABILITY: MAKING REFUGEE PROTECTION AN OPERATIONAL REALITY**

This section of the report attempts to provide a response to the challenges of law and practice raised in Part I and II.

- What are the necessary elements of fair procedure which should guide the identification of excludees? How far do the exclusion clauses themselves reach in defining criminal responsibility for the purposes of exclusion? (Chapter 5)

- Who has responsibility for ensuring the security of refugee and host populations in situations of complex conflict? (Chapter 6)
- How can exclusion serve as a bridge towards ending impunity for the worst criminals? What structures exist to bring them to justice, either nationally or internationally? (Chapter 7)
- What are the implications of forging links between the institution of asylum and the justice system, both conceptually and in practice? If realistic options for prosecution do not exist, what prevents those who have been excluded from falling into a legal limbo? What rights do excludees have, and who is responsible for securing them? (Chapter 8)

Each of the dilemmas dealt with in Chapters 5, 6, 7 and 8, represents a serious impediment to operationalizing exclusion and security in a situation of mass exodus; collectively, if these dilemmas cannot be resolved, they may conspire to pre-empt the use of the exclusion clauses in all but the most exceptional circumstances.

Chapter 5 sets out the legal framework which should guide the fair and transparent application of the exclusion clauses in future emergencies. This chapter seeks to provide a clear legal understanding of the exclusion clauses, from both a substantive and a procedural point of view: who should be excluded and how it should be done.

While procedural fairness safeguards are important at all stages of the asylum determination procedure, they are particularly essential when exclusion is at issue. Exclusion involves a determination that *despite* the fact that an individual may have a well-founded fear of persecution he or she may be returned to the place of potential persecution. As an exception to the fundamental prohibition on the return of a refugee to a situation endangering life or freedom, exclusion must be subject to the highest safeguards and interpreted restrictively. The findings on fair procedure set out here are based on the detailed research

and deliberations of the Lawyers Committee's Legal Advisory Group,<sup>7</sup> drawing significantly on comparative study of the application of the exclusion clauses within individual refugee status determination proceedings in Europe and North America.

**Chapter 5** also provides an overview of the current state of international law with respect to the definition of the crimes covered, explicitly or implicitly, by the exclusion clauses. Key issues in the determination of criminal responsibility for purposes of exclusion, such as complicity, the use of defenses and mitigating circumstances and the geographical scope of the clauses, are discussed. The relationship between the recent flurry of legislative activity aimed at responding to activities deemed to represent a "terrorist" threat in the aftermath of the September 11 attacks, and the application of the exclusion clauses, particularly the concept of "serious non-political crime," is specifically addressed.

It is apparent that the exclusion clauses cannot be dealt with in isolation as an emanation of refugee law with implications only for an individual's legal status. For the report's guidelines relating to fair procedure to have real practical effect, they need to be married to realistic operational strategies, involving a multiplicity of actors and dealing with the entire refugee security continuum, especially where host States are facing mass influxes of refugees with only minimal resources and rudimentary systems of governance.

**Chapter 6** recognizes that there is a new consensus emerging over the last decade that the international community's humanitarian obligations cannot be met in the absence of a secure environment for refugees. The component elements of a secure environment—which include early warning systems and preparedness, coherent registration procedures, prompt disarmament, prevention of arms trafficking, separation of combatants and potential excludees, demilitarization of camps, protection of the economic and social rights of refugees and the application of the exclusion clauses—are inextricably linked and mutually reinforcing. Certainly no screening for exclusion—at

least not a process with adequate procedural safeguards—can take place in an environment where refugees lack basic security.

At the same time, at the level of doctrine, the safety and security of refugees is increasingly being considered a condition of international peace and security. The Security Council has even gone so far as to indicate that it may take Chapter VII action (non-consensual intervention in a State's affairs under Chapter VII of the Charter of the United Nations) where it appears that the security failures within a refugee camp may catalyze a threat to regional or international security.<sup>8</sup> The presence of excludable elements has been recognized as a factor which might be considered in such an assessment. This acknowledgement that there may be scope for the Security Council to directly assume responsibility for refugee security, an opportunity ignored during the Rwanda crisis, is a very welcome development.

In the short term, however, refugee hosting States and the humanitarian community on the ground continue to rely on ad hoc measures to fill the refugee security gap, occasionally bolstered by bilateral assistance from interested States. In recent years, UNHCR has taken modest but important steps to remedy some of these shortcomings. In January 1999, the then UN High Commissioner for Refugees, Sadako Ogata, recommended the so-called "*Ladder of Options*" as an operational model for responding to security threats to refugees. UNHCR has rightly emphasized the importance of the lower rungs of the security ladder which concentrate on preventive options. These range from ensuring the safe size and location of camps, to representative self-administration by the refugee population itself and measures to ensure that food and other material assistance reaches the intended beneficiaries. In refugee camps in Tanzania and Guinea, UNHCR has introduced experimental programs, involving the training of local police and refugee officials. In July 2000, it proposed the appointment of Humanitarian Security Officers (HSOs) who would be available at the onset of a refugee emergency to advise the host government and the UN on appropriate measures to improve security. This is a particularly promising initiative.

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The aspect of the application of the exclusion clauses with which States appear to have wrestled with least success—particularly in situations of mass influx—was the post-exclusion phase. In some countries uncertainty surrounding what to do with excludees even resulted in a decision not to attempt to apply the clauses at all.

Chapters 7 and 8 consider the practical and legal implications of making a decision to exclude an individual.

At first glance, it might be assumed that individuals who have been excluded and no longer enjoy protection against refoulement would simply be handed over to the government of their country of origin to stand trial for the crimes for which they have been excluded. At the very least, it might be expected that they would be expelled from the country of asylum. In practice, however, excludees often pass into a legal limbo. A confusing international criminal law regime, coupled with a jurisdictional hesitancy born of complex legal and political factors, and an ambiguously defined folder of human rights obligations, are at the root of this problem. No longer under the protection of the international refugee regime, excludees often end up remaining in the host country on some ill-defined basis, often subject to indefinite detention, and continuing to enjoy effective impunity. With a future frozen in uncertainty, steps are neither taken to establish responsibility in criminal proceedings nor to clarify a new legal status formally in the host country or elsewhere.

States may be viewed as having a twofold duty once a person has been excluded from refugee status. They must ensure, as far as possible, that serious criminals are brought to justice and, at the same time, no matter how atrocious their crimes, that they continue to benefit from international human rights protection. Chapter 7 sets out the prosecution options which a State may contemplate.

Some excludable crimes are so serious under international law that *any* State may investigate, try and punish their perpetrators on the basis of the principle of universal jurisdiction. This is particularly true of those who have committed genocide, grave

breaches of the laws of armed conflict and crimes against humanity, all within the scope of Article 1F(a). Some crimes subject to universal jurisdiction may also be crimes which a State, via treaty, has declared itself *obliged* to try. Simply excluding the perpetrators of such crimes from protection as refugees is not sufficient in these cases.

There are three broad ways in which prosecution may go forward. First, States may prosecute the excluded individual in their own courts, under the principle of universal jurisdiction, or on other bases of connection with either the victim, or the location of the alleged crime. Second, States may extradite the excluded individual to face trial, either in the country where the crime was committed or in a third country. And third, States may surrender the excluded individual to an international tribunal. Where extradition is requested by an international court, such as the International Criminal Tribunal for Rwanda (ICTR), or the International Criminal Court (ICC), many States will have an obligation to comply.

None of these options provides an easy route for a State intent on ensuring that excludées are both tried fairly and held accountable for their crimes. National courts in the host country are often ill-equipped to prosecute crimes committed elsewhere, even in the most resource-rich States with highly developed legal systems. As the experience of national trials in Rwanda and Ethiopia suggests, in countries where war crimes and crimes against humanity have been recently committed, the justice system may be unable to guarantee a fair trial or even ensure the physical integrity of those who are surrendered to it.

Neither can international tribunals be expected to try all (or even many of) those who are excluded from refugee status. By its very nature, for example, the ICTR is a temporary institution, with limited jurisdiction and scant material and human resources. It has generally chosen to concentrate on a small number of high-ranking individuals responsible for the most serious crimes of the Rwandan genocide, rather than the rank-and-file killers and torturers who are likely to comprise the majority of those excluded from refugee sta-

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tus. Although the new ICC will provide a new forum for ensuring accountability for the most serious of crimes without strict geographical limitation, it too will inevitably face many of the same resource limitations and political restraints as the ad hoc tribunals.

Removing legal barriers to prosecution in various fora is only, however, part of the challenge. If the bridge between exclusion and accountability is to be firmly built, more coherent international support for efforts to secure international justice must secure its foundations. This does not simply mean mustering the political will to prosecute. It means a commitment on the part of the international community to support, politically and materially, the efforts of States that are struggling to establish, or re-establish, the rule of law and deal with issues of accountability as they emerge from devastating conflict.

While it will not be possible in all cases, taking action to try excludees is an important stepping stone in the battle against impunity which serves to reinforce the integrity of the international refugee and human rights regime as a whole. In the long term, ensuring accountability may even act as a deterrent to displacement.<sup>9</sup> One commentator has suggested:

It is now generally accepted that without effective accountability and the credible threat of prosecution, there is nothing to deter future atrocities or prevent recurring cycles of violence which in turn create further forced displacement. Ensuring criminal accountability nationally and internationally thus becomes one of a number of essential steps toward the prevention of forced displacement.<sup>10</sup>

Little thought has yet been given, however, to what this closer relationship between the twin goals of accountability and refugee protection will mean in practice for the key actors in the asylum and justice fields. The discussion of these links in **Chapter 8** becomes even more critical when considering new developments in international criminal law, particularly those relating to the ICC.

There must be a clear commitment to ensure that human rights law continues to protect those who are excluded from protection as refugees. The application of international and regional human rights norms will often serve to prevent the return of claimants who face torture or related persecution, or surrender to a situation where fair trial guarantees are lacking. Increasingly, international human rights law also operates as a bar to extradition where a suspect may face capital charges. As the numbers of those who cannot be returned to their home country or cannot be immediately transferred for prosecution continues to rise, the treatment of excludees needs to be energetically monitored by the international community. This is particularly so as the rights of excludees may be subject to quite extensive restriction. A potentially vital role might be played here by the Office of the High Commissioner for Human Rights, both in developing a framework for identifying excludee rights and monitoring their protection. Although the Office currently has limited operational capacity, its mandate uniquely positions it to act as protection watchdog, advocate and standard-setter in the exclusion process.

Finally, the expectation of what will happen to the excludee after removal from the asylum determination system critically shapes the exclusion screening procedure itself. Perceptions about the shape of the post-exclusion environment, and the roles and responsibilities of the different actors who will be involved in protecting and assisting excludees, can affect the whole operation of the procedure. The very application and interpretation of the exclusion clauses themselves, especially with regard to the use of concepts such as the *balancing test*,<sup>11</sup> will also be implicated. The post-exclusion landscape must, therefore, be thoroughly thought through prior to any consideration of exclusion.

#### PART IV: FROM THEORY TO PRACTICE: AN AGENDA FOR ACTION

If the theoretical promise of the exclusion clauses is ever to be realized in the chaotic real-world circumstances of State

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breakdown and widespread violence, a new approach is required. As was seen in Rwanda, the dearth of resources and the absence of political will on the part of host States (which have the primary obligation to assist refugees under international law) were only the most visible dimensions of the problem. The lack of a coherent and principled international response, particularly in the early stages of the unfolding genocide (widely acknowledged in the years that followed) massively exacerbated the disaster.

There is growing awareness in the international community today, however, of the intimate and organic linkages between refugee protection, ensuring accountability for war crimes and crimes against humanity, separating out armed elements from refugees and building international peace and security. UN Secretary-General Kofi Annan has made these connections explicit in his two major reports on the protection of civilians in armed conflict.<sup>12</sup> They are woven into the fabric of UNHCR's efforts to rejuvenate the commitment of governments, international agencies, and non-governmental organizations (NGOs) to the 1951 UN Refugee Convention, through its Global Consultations on International Protection.<sup>13</sup> The application of the exclusion clauses is a vital junction in this intricate web of related challenges that can only be met by the concerted efforts of a wide array of institutional actors, many of whom may not have traditionally seen themselves as mandated to protect the rights and security of refugees.

Chapter 9 of the report contains an *Agenda for Action* which the Lawyers Committee urges for consideration by a range of relevant actors in the international community. The recommendations are directed not only at government authorities and UNHCR, but at a variety of other UN bodies ranging from the Security Council and the Department of Peacekeeping Operations (DPKO) to the UN Development Programme (UNDP) and the UN Children's Fund (UNICEF); organizations such as the International Committee of the Red Cross (ICRC) and the International Organization for Migration (IOM) whose mandates

abut that of UNHCR; international financial institutions such as the World Bank and the regional development banks, which have a critical role to play in building up the legal infrastructure of States hosting large numbers of refugees; and major humanitarian agencies such as CARE, the International Rescue Committee, Oxfam, Save the Children, Médecins sans Frontières and many others, which have unparalleled experience of the realities of mass refugee flows and the intersecting imperatives of security, humanitarian assistance and refugee rights.

Host nations, other States, UN bodies, other regional and international organizations, humanitarian agencies and local and international NGOs must be prepared to coordinate their efforts and explicitly agree on a responsibility-sharing approach in relation to the whole continuum of the implied goals of exclusion. *Refugees, Rebels and the Quest for Justice* argues that this requirement to exercise collective responsibility, made explicit in the 1969 OAU Convention, is also implicit in the 1951 UN Convention. It is indispensable if rights are to be effectively protected and refugee and host population security maintained in a twenty-first century marked by shifting population movements, xenophobia and worsening levels of brutal civil conflict.

## BACKGROUND AND METHODOLOGY

This report is based on a multi-year program of research and advocacy aimed at enhancing refugee rights by establishing how exclusion can operate as an effective tool of protection.

As the exclusion clauses occupy a unique point of intersection between refugee law, international human rights law, humanitarian law and international criminal and extradition law, the Lawyers Committee for Human Rights assembled an expert advisory panel of scholars from each of these disciplines to guide the research.<sup>14</sup> Over a two-year period, the Legal Advisory Group conducted field missions, carried out academic research and writing and met periodically to confer in a series of workshops in Oxford, Geneva and New York.

The first phase of the research concentrated on the use of exclusion in the context of individual asylum procedures in North America and a number of European countries. The second phase explored the application of the exclusion clauses in situations of mass exodus resulting from war or generalized violence in Africa. Field research was carried out by members of the Legal Advisory Group and Lawyers Committee staff in the Central African Republic, Ethiopia, Guinea, Kenya, Liberia, Rwanda, Sierra Leone and Tanzania. This included a detailed examination of the role of the principal institutional actors involved in applying and dealing with the implications of the exclusion clauses—government authorities, the UN High Commissioner for Refugees and the International Criminal Tribunal for Rwanda.

In January 2001 the Lawyers Committee published a special supplementary issue of the *International Journal of Refugee Law (IJRL Special Issue)* dedicated to the question of exclusion from protection in situations of armed conflict and mass movement of refugees.<sup>15</sup> Edited by members of the Legal Advisory Group and coordinated and financed by the Lawyers Committee, the *IJRL Special Issue* dealt extensively with the legal and practical issues arising from the application of the exclusion clause in both individual status determination procedures and situa-

tions of mass influx, drawing on the research conducted to date, reflecting individual expert perspectives.

The publication of *Refugees, Rebels and the Quest for Justice* is intended to complement the field work and legal analysis reflected in the *IJRL Special Issue*. The Lawyers Committees hopes that it will serve as a platform for action by those who now face the challenge of translating the promise of the exclusion clauses into an operational reality.

FOOTNOTES TO ACKNOWLEDGMENTS, INTRODUCTION  
AND BACKGROUND AND METHODOLOGY

<sup>1</sup> The exclusion clauses constitute the provisions of Article 1F (a) to (e) of the 1951 United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954 [hereinafter “the 1951 UN Convention”] and Article I(5) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, *entered into force* June 20, 1974 [hereinafter the “1969 OAU Convention”]. Article 1(5) of the 1969 OAU Convention tracks the provisions of Article 1F almost exactly, with two exceptions. First, the 1969 OAU Convention clauses explicitly provide that it is “the country of asylum” that must determine whether there are “serious reasons for considering” excludability. Second, an additional provision in the 1969 OAU Convention stipulates a fourth category of excludable individual—one who “has been guilty of acts contrary to the purposes and principles of the Organization of African Unity.” Discussion of Article 1F of the 1951 UN Convention in this report applies equally to Article 1(5) of the 1969 OAU Convention, unless otherwise stated.

<sup>2</sup> Dr. Bertrand G. Ramcharan, Assistant Secretary-General of the United Nations, UN Deputy High Commissioner for Human Rights, “Human Rights and Human Security,” speech delivered at the *Workshop on the Relationship between Human Rights and Human Security*, San Jose, Costa Rica, December 2, 2001 organized by the Commission on Human Security.

<sup>3</sup> The term “terrorist” has been the subject of controversial debate. There is currently no globally accepted definition. For a fuller discussion of the question of terrorism in the context of the exclusion clauses see Chapter 5, p.137.

<sup>4</sup> Under the Geneva Conventions States actually have a duty to “search for persons,” prosecute, and punish, those responsible for grave breaches of the laws of armed conflict (covered by Article 1F(a)) before their own courts, regardless of the nationality of the perpetrators. The Geneva Conventions comprise: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950; Geneva

## REFUGEES, REBELS AND THE QUEST FOR JUSTICE

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950 [hereinafter Third Geneva Convention]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950) and its Protocols (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978 [hereinafter Protocol II]). These instruments are generally considered to constitute customary international law on account of their almost universal ratification by States.

<sup>5</sup> Under international refugee law States have a duty to admit those fleeing persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Under the 1969 OAU Convention Article I(2) this obligation also extends to those who are compelled to leave their place of habitual residence owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or all of their country of origin or nationality. For a fuller discussion of the implications of this provision, see the Lawyers Committee for Human Rights, *African Exodus* (New York: 1995) at 29-30.

<sup>6</sup> For a more detailed discussion of the categories of persons who may be subject to separation operations please see Chapter 4.

<sup>7</sup> For a list of the members of the Legal Advisory Group see above at p. i.

<sup>8</sup> See Security Council Resolution No. 1296 on the protection of civilians in armed conflict, UN doc. no. S/RES/1296(2000), October 31, 2001 [hereinafter "Resolution 1296"].

<sup>9</sup> Judge Navanethem Pillay, "International Criminal Tribunals as a Deterrent to Displacement" in Anne F. Bayesfski and Joan Fitzpatrick eds., *Human Rights and Forced Displacement*, (Kluwer Law

International, Martinus Nijhoff Publishers, The Hague: 2000) [hereinafter *Human Rights and Forced Displacement*].

<sup>10</sup> Stephanie Grant, “The Future: Articulating Responsibilities to Identify and Bring to Justice Perpetrators of Serious Human Rights Violations and International Crimes,” in *Human Rights and Forced Displacement*, *supra* note 9.

<sup>11</sup> The *balancing test*, as an integral element in applying the exclusion clause, involves a weighing of the harm faced by the potential excludee and the gravity of the alleged crime in the context of all the circumstances of the case. For a fuller discussion, see Chapter 5.

<sup>12</sup> See *Report of the Secretary-General on the Protection on Civilians in Armed Conflict*, UN doc. no. S/1999/957, September 8, 1999; *Report of the Secretary-General on the Protection on Civilians in Armed Conflict*, UN doc. no. S/2001/331, March 30, 2001.

<sup>13</sup> The Global Consultations on International Protection was a unique program launched by UNHCR in 2000 to rejuvenate the commitment of governments, international agencies and NGOs to the 1951 UN Convention on the occasion of the 50<sup>th</sup> Anniversary of its signing. One of the goals of the process was to identify gaps in refugee law standards and procedures which render the international refugee regime less effective. For a full description of the process and an overview of outcomes, see <http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations>.

<sup>14</sup> See footnote 7.

<sup>15</sup> Chaloka Beyani, Joan Fitzpatrick, Walter Kälin and Monette Zard, Guest Editors, “Exclusion from Protection: Article 1F of the 1951 United Nations Refugee Convention and Article I(5) of the 1969 OAU Convention in the Context of Armed Conflict, Genocide and Restrictionism,” *International Journal of Refugee Law* 12, Special Supplementary Issue, (Winter 2000) [hereinafter *IJRL Special Issue*].